identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
LIN 07 005 51012

AUG 1 6 2010

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importer and sales company of telecom equipment. It seeks to employ the beneficiary permanently in the United States as a IT Manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2006 priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment

Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Here, the Form ETA 9089 was accepted on April 13, 2006. The proffered wage as stated on the Form ETA 9089 is $42.37 per hour ($88,129.60 per year). The Form ETA 9089 states that the position requires a Master's degree in computer engineering with twenty four months of work experience in the proffered position.[2]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year runs from May 1 to April 30 of the respective year. On the Form ETA 9089, signed by the beneficiary on June 28, 2006, the beneficiary claimed to have worked for the petitioner as of November 8, 2005 and to the date the Form ETA 9089 was filed with DOL. The beneficiary also indicated that he had worked for Pine Green, Inc. located at the same address for brief periods of time prior to November 8, 2005.

In support of the petition, the petitioner submitted its Form 1120 for tax year 2004 that indicates the petitioner has a taxable income before net operating loss deduction and special deductions of $13,468, and net current assets of -$378,996.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 21, 2007, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated that the petitioner's Form 1120 for tax year 2004 was not dispositive of the petitioner's ability to pay the proffered wage as of the April 13, 2006 priority date, and

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] The record contains a transcript of the beneficiary's Master's degree coursework at the [redacted] This document states the beneficiary's graduate degree was awarded on May 21, 1999.Thus, the question of the beneficiary's academic qualifications for the proffered position is affirmatively established. The record also contains a letter of work verification from [redacted] Korea. This letter details three times in which the beneficiary worked for this company. The combined employment times total 23 months, or one month less than the stipulated 24 months of work experience prior to the 2006 priority date. If the petitioner pursues this matter, it needs to provide more corroborating evidence with regard to the additional periods of employment noted on the Form ETA 9089.

requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements for tax years 2005 and 2006 to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also requested copies of the beneficiary's W-2 Forms for tax year 2005 and 2006, as well as a copy of the beneficiary's most recent pay voucher, with information on the beneficiary's gross pay, income received year to date, income tax deductions withheld and length of the pay period.

In response, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for the petitioner for the year 2005 that covers the priority date of April 13, 2006. The petitioner also submitted the beneficiary's W-2 Forms for tax years 2005 and 2006,[3] and the beneficiary's biweekly earnings statements for June 1, 2007 through August 15, 2007. The beneficiary's statement for August 15, 2007 indicates year to date earnings of $30,121.20. All statements reflect biweekly earnings of $2,008.

The tax returns reflect the following information for tax year 2005:

	2005
Net income	$ 21,216
Current Assets	$ 1,040,603
Current Liabilities	$ 1,458,988
Net current assets	-$ 418,385

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 11, 2008, denied the petition.

On appeal, counsel asserts that the petitioner had sufficient resources to pay the proffered wage in tax year 2005, noting that the petitioner on its 2005 tax returns shows available cash of $440,762. Counsel submits no further evidence.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it paid the beneficiary did not establish that it employed and paid the beneficiary the full proffered wage in 2005 or 2006.

[3] These documents indicate that the petitioner paid the beneficiary $8,032.32 in 2005 and $48,193.92 in 2006. Both yearly wages are less than the proffered wage of $88,129.60.

Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2005 and 2006.[4]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d).[6] Its year-

---

[4] The difference between the beneficiary's actual wages and the proffered wage is $80,097.28 in 2005 and $39,935.68 in 2006.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[6] Although counsel asserts on appeal, that the petitioner's available cash can be considered as an

end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The AAO notes that the director referred to a prorated timeline for the beneficiary's wages for tax year 2006 and then determined that the petitioner did not pay the beneficiary wages that were equal or greater than the proffered wage. This comment is based apparently on the fact that the April 13, 2006 priority date for the instant petition was 27 days prior to the end of the petitioner's 2005 fiscal year. The AAO does not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the 2006 priority date (and only that period) and the end of the petitioner's fiscal year, the petitioner has not submitted such evidence. Further the record does not contain the petitioner's 2006 Form 1120 that would have provided a clearer view of the petitioner's financial resources for the period April 30 to May 1, 2006, a complete fiscal year. The director's remark with regard to prorating the proffered wage is withdrawn, although his final conclusions with regard to the petitioner's ability to pay the proffered wage in tax year 2006 are correct.

The petitioner has not demonstrated that it paid the full proffered wage based on its 2005 tax return. The petitioner shows a net income of $21,216, and negative net current assets of -$418, 385, and has not, therefore, demonstrated the ability to pay the difference between the beneficiary's actual wages and the proffered wage, based on its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2005.

The record of proceedings closed with the receipt by the director of the petitioner's response to the RFE on August 31, 2007. Although the petitioner's 2006 tax return for a period of time ending on April 30, 2007 may have been available, the petitioner did not submit it to the record. Thus, the AAO cannot examine whether the petitioner had sufficient net income or net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, or $39,935.68, in 2006. The petitioner has not demonstrated that it paid the full proffered wage in 2006. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2006.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2005 or subsequently during 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

---

additional financial source to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, the petitioner's available cash is included the analysis of the petitioner's net current assets, and will not be considered again to establish ability to pay.

Counsel's assertion on appeal with regard to the petitioner's available cash in 2005 cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record does not contain any evidence beyond the petitioner's tax returns for 2004, and 2005. With regard to items such as longevity of business, the record reflects that the petitioner has been in business since 2002, or four years prior to filing the ETA Form 9089 and I-140 petition. With regard to officer compensation, the record indicates officer compensation, which is a discretionary expense, was $35,000 in 2004, and that no officer compensation was paid in 2005.

With regard to the petitioner's gross receipts and wages, the record reflects wages of $257,589 and gross receipts of $2,677,599 for tax year 2004, and wages of $342,041 and gross receipts of $2,954,002 in tax year 2005. While both the gross receipts and total wages have increased, these two factors do not provide sufficient evidence as to the petitioner's ability to pay the beneficiary the full proffered wage, or indicate that the petitioner is a viable company going forward into tax year 2006 and onward. The AAO notes that if the beneficiary were paid his full proffered wage of $878,129.60 in tax year 2005, his wages alone would have required almost a third of the wages paid for the claimed thirteen employees in tax year 2005. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.